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ONECOMMAND, INC.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ALAN BRINKER, individually and on behalf of all others similarly situated, Plaintiff, vs. NORMANDIN'S, a California corporation, d/b/a NORMANDIN CHRYSLER JEEP DODGE RAM, and ONECOMMAND, Inc. Defendants.	Case No.: 5:14-cv-03007 EJD HRL **ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT ONECOMMAND, INC.** Filing Date of Original Complaint: July 1, 2014 Filing Date of First Amended Complaint: March 10, 2015

Defendant, ONECOMMAND, INC. ("ONECOMMAND"), for its Answer and Affirmative Defenses to the First Amended Complaint ("Complaint") of Plaintiff, ALAN BRINKER, states as follows:

I. INTRODUCTION

1. ONECOMMAND denies that a class action or any damages, injunctive relief or other remedies are appropriate. ONECOMMAND specifically denies making or participating in any violations of the TCPA, and asserts that any alleged calls in this case were made with the prior express consent of the recipient, were informational in nature, and/or were not made for the purposes of collecting a debt or for soliciting the sale of goods or services. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the remaining allegations contained in paragraph 1 of the Complaint, and therefore denies same.

II. PARTIES

2. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 2 of the Complaint, and therefore denies same.

3. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 3 of the Complaint, and therefore denies same.

4. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegation that it "does business throughout the United States, including California," and therefore denies same. ONECOMMAND admits the remaining allegations contained in paragraph 4 of the Complaint.

III. JURISDICTION AND VENUE

5. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 5 of the Complaint, and therefore denies same.

6. ONECOMMAND denies that it engaged in any "wrongful acts" in California or elsewhere. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the remaining allegations contained in paragraph 6 of the Complaint, and therefore denies same.

7. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 7 of the Complaint, and therefore denies same.

IV. THE TELEPHONE CONSUMER PROTECTION ACT OF 1991, 47 U.S.C. § 227

8. ONECOMMAND admits that the Telephone Consumer Protection Act of 1991 ("TCPA") was enacted by Congress in or about 1991. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the remaining allegations contained in paragraph 8 of the Complaint, and therefore denies same.

9. ONECOMMAND admits that the text of the TCPA is set forth at 47 U.S.C. § 227, and that the text of the TCPA speaks for itself. ONECOMMAND denies the allegations contained in paragraph 9 of the Complaint to the extent that they misstate or misrepresent the content of the TCPA.

10. ONECOMMAND admits that the FCC has promulgated regulations pursuant to the TCPA, and that the text of such regulations speaks for itself. ONECOMMAND denies the allegations contained in paragraph 10 of the Complaint to the extent that they misstate or misrepresent the referenced regulations.

11. ONECOMMAND admits that the FCC has promulgated regulations pursuant to the TCPA, and that the text of such regulations speaks for itself. ONECOMMAND denies the allegations contained in paragraph 11 of the Complaint to the extent that they misstate or misrepresent the referenced regulations.

V. FACTUAL ALLEGATIONS

12. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 12 of the Complaint, and therefore denies same.

13. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 13 of the Complaint, and therefore denies same.

14. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 14 of the Complaint, and therefore denies same.

15. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 15 of the Complaint, and therefore denies same.

16. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 16 of the Complaint, and therefore denies same.

17. ONECOMMAND denies the allegations contained in paragraph 17 of the Complaint.

18. ONECOMMAND admits that it made one or more calls on behalf of and at the request of Defendant NORMANDIN'S similar to the call described in paragraph 15 of the Complaint. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the remaining allegations contained in paragraph 18 of the Complaint, and therefore denies same.

19. ONECOMMAND admits that it made one or more calls on behalf of and at the request of Defendant NORMANDIN'S similar to the call described in paragraph 15 of the Complaint. ONECOMMAND denies that it made or participated in any unconsented telephone calls. ONECOMMAND is without knowledge or

information sufficient to enable it to admit or to deny the remaining allegations contained in paragraph 19 of the Complaint, and therefore denies same.

20. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 20 of the Complaint, and therefore denies same.

VI. CLASS ACTION ALLEGATIONS

21. ONECOMMAND denies that any class should be certified in this case. Class certification would be inappropriate, among other reasons, because Plaintiff has no valid claim, because the proposed class is overly broad and includes putative class members who provided prior express consent to receive calls from NORMANDIN'S by providing the phone numbers as contact numbers, and because Plaintiff's individual issues predominate over any class-wide issues. ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the remaining allegations contained in paragraph 21 of the Complaint, and therefore denies same.

22. ONECOMMAND denies that any class exists or should be certified by the Court. Further answering, ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 22 of the Complaint, and therefore denies same.

23. ONECOMMAND denies that any class exists or should be certified by the Court, and denies that any injunctive or other relief is warranted in this case. ONECOMMAND denies violating the TCPA, making any unconsented calls, or using an ATDS as defined by the TCPA. Further answering, ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 23 of the Complaint, and therefore denies same.

24. ONECOMMAND denies that any class exists or should be certified by the Court, and denies that any injunctive or other relief is warranted in this

case. Further answering, ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 24 of the Complaint, and therefore denies same.

25. ONECOMMAND denies that any class exists or should be certified by the Court, and denies that any injunctive or other relief is warranted in this case. Further answering, ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 25 of the Complaint, and therefore denies same.

26. ONECOMMAND denies that any class exists or should be certified by the Court, and denies that any injunctive or other relief is warranted in this case. Further answering, ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 26 of the Complaint, and therefore denies same.

27. ONECOMMAND denies that any class exists or should be certified by the Court, and denies that any injunctive or other relief is warranted in this case. ONECOMMAND denies violating the TCPA, making any unconsented calls, or using an ATDS as defined by the TCPA. Further answering, ONECOMMAND is without knowledge or information sufficient to enable it to admit or to deny the allegations contained in paragraph 27 of the Complaint, and therefore denies same.

28. ONECOMMAND denies the allegations contained in paragraph 28 of the Complaint.

VII. FIRST CLAIM FOR RELIEF
(Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A) – Cellular Telephone Calls)

29. ONECOMMAND incorporates by reference paragraphs 1 through 28, above, as if fully restated herein.

30. ONECOMMAND denies the allegations contained in paragraph 30 of the Complaint.

31. ONECOMMAND denies the allegations contained in paragraph 31 of the Complaint.

32. ONECOMMAND denies the allegations contained in paragraph 32 of the Complaint and further denies that any Class exists or should be certified by the Court.

VIII. SECOND CLAIM FOR RELIEF
(Knowing and/or Willful Violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1)(A) – Cellular Telephone Calls)

33. ONECOMMAND incorporates by reference paragraphs 1 through 32, above, as if fully restated herein.

34. ONECOMMAND denies the allegations contained in paragraph 34 of the Complaint.

35. ONECOMMAND denies the allegations contained in paragraph 35 of the Complaint.

36. ONECOMMAND denies the allegations contained in paragraph 36 of the Complaint and further denies that any Class exists or should be certified by the Court.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Complaint fails to state a claim for relief against ONECOMMAND upon which relief can be granted.

Second Affirmative Defense

Plaintiff provided prior express consent for any telephone calls received. *See* Rules and Regulations Implementing the Telephone Consumer Protection Act of

1991, CC Docket No. 92-90, Report and Order, 7 FCC Rcd 8752 at 8769, ¶ ¶ 7,31; *Baird v. Sabre Inc.*, 995 F.Supp.2d 1100 (C.D. Cal. 2014).

Third Affirmative Defense

ONECOMMAND did not make any calls using an "automatic telephone dialing system," as defined by the TCPA.

Fourth Affirmative Defense

Plaintiff's claims are barred by the doctrine of unclean hands.

Fifth Affirmative Defense

Plaintiff's claims are barred by the doctrines of waiver, acquiescence, estoppel and/or laches.

Sixth Affirmative Defense

Plaintiff has failed to mitigate his alleged damages.

Seventh Affirmative Defense

The TCPA is void, in whole or in part, for vagueness.

Eighth Affirmative Defense

The TCPA violates the First, Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

Ninth Affirmative Defense

ONECOMMAND is not liable under the TCPA for the telephone calls allegedly made to Plaintiff's phone number.

Tenth Affirmative Defense

Plaintiff lacks standing to assert the claims alleged in the Complaint.

Eleventh Affirmative Defense

To the extent that Plaintiff sustained any actionable damages, such damages were caused as a result of the actions and/or omissions of Defendant NORMANDIN'S, and not by any alleged action or omission of ONECOMMAND.

Twelfth Affirmative Defense

Plaintiff's alleged claims for equitable relief are barred because Plaintiff has an adequate and available remedy at law for any alleged claims that are proven by the evidence.

Thirteenth Affirmative Defense

ONECOMMAND serves notice that it intends to rely upon and assert any additional affirmative defenses that become known or available in the course of discovery and reserves the right to amend its Answer to assert any and all such affirmative defenses.

PRAYER FOR RELIEF

Wherefore, ONECOMMAND, INC. prays that the Court enter judgment in its favor as follows:

A. Dismissal of the Complaint, with prejudice;

B. An award to ONECOMMAND, INC. of its costs, reasonable attorneys fees, and expenses; and

C. An award to ONECOMMAND, INC. of all further and additional relief as the court deems just and proper.

Dated: April 16, 2015

Respectfully submitted,

GORDON & REES LLP

By: *\/s/ Sean P. Flynn*
Sean P. Flynn
Attorneys for Defendant
OneCommand, Inc.

DEMAND FOR JURY TRIAL

PLEASE TAKE NOTICE that Defendant, ONECOMMAND, INC., hereby demands a trial by jury in this action.

Dated: April 16, 2015 **GORDON & REES LLP**

By: *_/s/ Sean P. Flynn_*
Sean P. Flynn
Attorneys for Defendant
OneCommand, Inc.

CERTIFICATE OF SERVICE

The foregoing pleading was filed electronically using the Court's ECF docketing system on April 16, 2015, which provides service to all counsel of record electronically.

/s/ Sean P. Flynn
Sean P. Flynn

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